OLC 67-2256

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Mr. Lawrence R. Houston
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Larry:

Your request to Walt Yeagley that the Department review the draft letter on S. 1035 you are considering sending to the House Committee has been referred to me. I think the letter states persuasively the arguments against including intelligence agencies within the prohibitions of the bill, and I agree with most of your analysis of the bill. However, I have a couple of suggestions pertaining to your analysis of two of the subsections of the bill.

First, I think you overstate the probable effect of subsection 1(d). This subsection makes it illegal to request an employee to report on any activities unless they are related to the performance of his official duties. Your letter suggests that this subsection might prevent the CIA from asking an employee about reports that he is in unauthorized contact with foreign agents. However, subsection 1(d) specifically allows requests for information about the outside activities of a federal employee when there is reason to believe that the activities are in conflict with his official duties. It seems to me that this exception from the general rule of the subsection would eliminate the problems you pose in the last paragraph on page three.

Second, I suggest that you consider stating the arguments against section 6 on the basis of an ambiguity as to its meaning. On the one hand, if the section requires a personal finding with respect to each person to be tested, then, as you indicate, overall security might be jeopardized because general regulations cannot apply. Moreover, the result of a personal finding would be to notify the individual involved that he is considered some kind of unusual risk. Requiring an individual to take a test because of some individual problem, rather than because of a general regulation applicable to all applicants for a particular job, seems a greater affront to the individual than would be the case under current procedures. On the other hand, so long as a designee, rather than the Director personally, has authority to order polygraph or psychological examinations, the practical effect could be that the tests will be required in connection with certain jobs. If this would be the result of the section, then the words "personal finding" can only create confusion in relations between the Agency and its prospective employees.

Except for these two suggestions, I agree with the analysis of the bill in the letter. For your information, I am enclosing a copy of the Attorney General's letter of May 19, 1967, to Senator Ervin on the earlier version of S. 1035 which was referred to the Senate Subcommittee on Constitutional Rights.

Sincerely,

Frank M. Wozencraft
Assistant Attorney General
Office of Legal Counsel

Enclosure

MAY 19 1967

Honorable Sam J. Ervin, Jr.
Chairman,
Subcommittee on Constitutional Rights,
Committee on the Judiciary,
United States Senate,
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 1035, a bill "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

The bill makes it a criminal offense for officers of executive departments or agencies, including commissioned officers of the Armed Forces, to engage in any one of various personnel practices enumerated in section 1 affecting their civilian subordinates and applicants for employment. Among these are requirements that employees disclose certain personal information, submit to psychological or polygraph tests, engage in certain forms of political activity, or participate in activities not related to the performance of official duties. The bill also makes it a criminal offense for any officer of the Civil Service Commission to require or request any department or agency or any official therein to violate any of the prohibitions of section 1 or to require or request any person seeking to establish

civil service status or eligibility for employment in the executive branch to submit to any interrogation or examination or psychological or polygraph test concerning certain matters of a personal nature. A Board on Employees' Rights would be created to investigate complaints of violations or threatened violations. The Board, whose three members would be appointed by the President by and with the advice and consent of the Senate, would be empowered to issue cease and desist orders, to seek to prevent an unlawful act by conciliation and persuasion, and to order the removal of or suspension without pay of an offending officer other than an officer appointed by the President by and with the advice and consent of the Senate. Any final determination of the Board would be subject to judicial review. In addition, the bill would permit civil actions in U. S. district courts to prevent a threatened violation or to obtain redress against the consequences of a violation regardless of whether the aggrieved party had exhausted administrative remedies.

The prohibitions contained in the bill, insofar as they are circumscribed by provisos eliminating certain possible interpretations which would be harmful to the effective operations of the Government, represent a substantial improvement over the general prohibitions set forth in S. 3779, of the 89th Congress, which was similar in purpose to the present bill. As with respect to S. 3779, the Department strongly supports the purpose of the bill to maintain the dignity of individuals in Government service by protecting them from unnecessary or unjustified encroachment upon their personal privacy and freedom. Nevertheless, it is our view that improvements in this area should not be attempted by prescribing criminal penalties. It is also our view that the administrative and civil remedies provided by this bill would constitute an unnecessary burden upon the Government. At the same time enactment of S. 1035 might impair the ability of the Government to perform many legitimate functions because the broad and vague language of a number of the prohibitions, however circumscribed to preclude certain unintended inter-

pretations, may be construed to prescribe activities essential to the security and protection of the Government, to the administration of an efficient employee personnel program and to effective law enforcement.

Although we consider that the employee rights which the bill seeks to protect are adequately safeguarded by existing law and Executive branch policy and practices, we would not be opposed to enactment of the bill if revised to satisfy the foregoing objections. We understand that the Civil Service Commission is suggesting to this Committee specific changes in this respect. Consequently, this report will limit itself to those aspects of the bill in its present form which are of particular concern to us in the context of our responsibilities.

The proposed section 1(a), prohibiting the requesting of information regarding an employee's race, religion or national origin, adds nothing to present protections in this area and may prevent the Government from obtaining information which would be valuable in solving discrimination problems. Existing Federal law prohibits discrimination based on the grounds enumerated in the section 1(a) prohibition and empowers the President to promulgate rules enforcing the declared nondiscrimination policy. 5 U.S.C. 7151 (1966). Moreover, the reporting of race, religion and national origin may be helpful in gathering legitimate information that can assist in exposing areas where discrimination, otherwise invisible, may exist.

The experience of the Department in enforcing various laws against racial discrimination is that racial statistics are extremely helpful in identifying the areas where discrimination exists. Indeed, the absence of racial statistics has sometimes hampered effective enforcement. In the past in some areas, such as voter registration, it often would have been impossible to prove discrimination apart from the statistics, which had to be gathered at great expense. This

is presently true in dealing with employment investigations and cases against private employers and unions under Title VII of the Civil Rights Act of 1964. In the area of government employment the statistics, if maintained, will enable department and agency heads readily to make a preliminary determination whether the nondiscrimination policy is being carried out and to identify those areas where further investigation or other action seems to be needed.

The countervailing privacy interests do not seem very weighty. A person's "race", as that term is used for government employment purposes, is ordinarily self-evident to any observer and can hardly be deemed a private matter. That, of course, is not true with respect to religion or national origin, and compulsory disclosure of this information may run counter to some notions of privacy. Nevertheless, in recognition of such considerations, we would not object to providing that if an applicant or employee affirmatively objects to declaring his race, religion, or national origin, he may not be compelled to do so. We do not believe that the privilege to refuse would be invoked sufficiently often to seriously distort the statistics.

However desirable it may be to establish limitations upon the powers of officers of the Government in their relationships with their subordinates, we seriously doubt the advisability of imposing criminal penalties upon conduct which is so closely related to the normal required activities of Government officers as that which is made the subject of the section 1 prohibitions. If this bill were enacted into law, Federal officials in supervisory positions would constantly be acting in peril of being imprisoned if they should inadvertently overstep the vague line between their duties and the conduct made unlawful by the bill. This could severely handicap the operation of the Government and even result in some loss of executive manpower. In brief, if the problem to which the bill is addressed is of sufficient magnitude to require legislative treatment, the use of criminal sanctions is in our opinion of doubtful wisdom and of great potential harm.

It is questionable, also, in our opinion, that the prohibitions contained in the bill meet the standard for specificity in criminal law established by the Supreme Court:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . ." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

An example of the objectionable indefiniteness of the bill is the sweeping prohibition in section 1(c) against requests or directions to participate in non-job-related activities. It could be construed to prevent an employer from asking an employee to supervise or assist in such projects as the annual Combined Federal Fund Campaign, periodic blood drives, or the U.S. Savings Bond participation program.

We question the desirability of the provisions in the bill for administrative and civil remedies. The establishment of a Board on Employees' Rights would duplicate existing grievance procedures in the executive branch and interfere with agency operations. The provisions of section 5, particularly those permitting damage suits irrespective of the actuality or amount of pecuniary injury, would subject Government officials to the harassment and inevitable hazards of vindictive or ill-founded civil suits. In addition, even if civil remedies should be appropriate, they should be made available only after administrative relief procedures have been exhausted. The bill, however, would afford an aggrieved employee the right to go directly into court, thus ignoring the elaborate administrative procedures which would be made

available to him under section 6 or any other administrative remedies available to him. To permit an employee to sue in court without exhausting available administrative remedies undoubtedly would promote litigation, some of which inevitably would result in a waste of valuable court time and administrative expense.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Attorney General